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No. 804

In the Supreme Court of the United States.

OCTOBER TERM, 1959

NELLIE DAVENPORT, Administrator of the Estate of Earl Davenport, Deceased, and NELLIE DAVENPORT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 47-86)[1] is reported in 173 F. Supp. 475. The opinion of the Court of Appeals (Pet. 14-18) is reported in 273 F. 2d 231.

[1] Record references are to Appendix B to the Government's brief, separately bound, filed in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1959. (Pet. 2.) The petition for a writ of certiorari was filed on March 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly accepted the Government's concession as to the cost of property where the taxpayer failed to introduce any evidence to support his claim.

2. Whether, in computing the cost basis of property for the purpose of ascertaining gain or loss on its sale, it was proper to exclude part or all of the amount paid to a divorced wife as a settlement of her marital rights, including dower and homestead rights in the property sold.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.
>
> (a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
>
> * * * * *
>
> (26 U.S.C. 1952 ed., 111.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; * * *

* * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) [As amended by Sec. 130(b), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 204 (b), Revenue Act of 1950, c. 994, 64 Stat. 906] *General rule.* Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, or for expenditures described in section 23(bb), for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * *

(26 U.S.C. 1952 ed., 113.)

STATEMENT

Prior to July 25, 1947, Earl Davenport and Mayme Davenport were husband and wife (R. 27-34, 48). In anticipation of a divorce, they entered into a settlement of property rights which provided in part that Earl Davenport would pay to Mayme Davenport $52,000 "in full settlement of all her right, title and interest in the real estate of" Earl, "and as settlement of her property rights, claim for alimony or support money and including her attorneys fees and court costs." The agreement also provided that in case a decree was entered, the agreement should be incorporated in the decree and considered a part thereof. (R. 14, 20-21, 25, 48-54.)

Thereafter, on July 25, 1947, a decree, dissolving the marriage, incorporated and approved the above-mentioned agreement. (R. 14, 29-30, 54-55.) The decree reads in part as follows (R. 30):

> (10) The Court finds that as a part of the consideration to the said Mayme Davenport for her waiver of future claims for property and alimony, the said Earl Davenport has agreed to pay to the Plaintiff, Mayme Davenport, the sum of $52,000.00 (fifty-two thousand dollars) in full settlement of all her right, title, and interest in the real estate of the Defendant, and any settlement of her property rights, claim for alimony or support money and including her attorney's fees and court costs, said sum of money to be paid in the manner following:
>
> * * * * *

Subsequent to the issuance of the divorce decree, Mayme Davenport executed a quit claim deed in favor of Earl (R. 21, 36-39, 43-46, 59-61), and he gave her $52,000 in "full settlement of payments due under divorce decree post nuptial agreement" (R. 14, 35, 74).

A portion of the land which Earl Davenport owned at the time of the settlement and divorce was sold on January 3, 1948, by him and a new wife, Nellie (the taxpayers involved in this case)[2] for $120,221.75. (R. 12-13, 15, 40-41, 47, 59.) In their joint return for 1948, in computing an alleged loss on the sale of this land, they included in full the $52,000 payment to Mayme Davenport as a cost of acquiring the land that was sold. (R. 15, 17, 47-48). The $52,000 item was disallowed by the District Director of Internal Revenue. The taxpayers thereafter paid the resulting deficiency in tax, plus interest, and filed a timely claim for refund. Upon rejection of this claim the instant suit was instituted. (R. 3-7, 13, 48.)

The district court found that, of the $52,000 paid to Mayme Davenport, $5,000 was paid for her attorney's fees and was not attributable to the cost of the acquisition of the land, but that $47,000 of that sum was paid for release of her dower, homestead, and rights of inheritance, and concluded that "the Director of Internal Revenue erred in disallowing the said $47,000.00 as a cost of acquisition basis." (R. 87-88.) The court of appeals reversed the judgment of the district court

[2] Nellie Davenport is involved as a taxpayer only because of the filing of a joint return for the taxable year.

on the ground that the Internal Revenue Service had correctly computed the tax deficiency assessed and paid. (Pet. 14-18.)[3]

ARGUMENT

The decision of the court below is correct. Section 113(a) of the Internal Revenue Code of 1939, *supra*, p. 3, provides that the unadjusted basis of property shall be the cost of such property, with certain exceptions, and Section 113(b), *supra*, p. 3, provides in part that, for determining gain or loss from the sale or other disposition of property that basis shall be adjusted for expenditures properly chargeable to capital account.

In this case there is a dispute first as to the unadjusted basis of the land that was sold, and, secondly, as to the adjusted basis. As to the unadjusted basis, the taxpayers in their joint return for 1948 represented that the cost of the land was $66,575.25 (R. 15), but, as the Court of Appeals noted (Pet. 18), failed to introduce evidence in support of that figure. The Government conceded in the court below that the unadjusted basis of the land was $35,605, and that court, in the absence of evidence to show that this figure was incorrect, decided that the latter amount was the correct unadjusted cost basis of the land here involved. The court below said in its opinion (Pet. 18):

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[3] Earl Davenport died (Pet. 9) on February 14, 1959, and the Court of Appeals entered an order on August 19, 1959, that Nellie Davenport, Administrator of the Estate of Earl Davenport, deceased, be substituted as party plaintiff in the cause and that the caption of the cause be changed accordingly.

> The only evidence in the record to substantiate the original cost unadjusted basis of the land was the income tax return for the year 1948 which stated the cost at $66,575.25. The return was admitted in evidence as plaintiffs' Exhibit "A" pursuant to stipulation which simply provides that the exhibit is the original joint income tax return for 1948 which Earl and Nellie Davenport filed. We have searched the record and can find no stipulation or admission that either the unadjusted basis in the amount of $66,575.25 as claimed in the return or the adjusted basis to which the $52,000 payment had been added were correct. The taxpayers had the burden of proving that this was a correct basis for determination of their tax liability.

This is in accord with well-settled law that to establish a basis for proving a loss the burden is on the taxpayer. *Burnet* v. *Houston*, 283 U.S. 223, 227; *Helvering* v. *Taylor*, 293 U.S. 507, 514.

With respect to the second question, whether any portion of the $52,000 payment may, in computing the adjusted basis of the property under Section 113(b) of the 1939 Code, be properly added to its unadjusted basis on the ground that such portion was paid for the release of inchoate dower or homestead rights in the property sold, the court below correctly held that the payment of the $52,000[4] was in no way connected with the sale of the property:

[4] The District Court found that $5,000 of this figure was paid for Mayme Davenport's attorneys' fees and was not attributable to the cost of acquisition. (R. 87.)

that it did not represent a cost of defending or perfecting title to the property, but, that on the contrary it was merely a personal expenditure (Pet. 17-18). In support of its conclusion the court below cited *O'Malley* v. *Yost*, 186 F. 2d 603, rehearing denied, 189 F. 2d 331 (C.A. 8), where the taxpayer paid his estranged wife one-half of the net proceeds of the sale of certain real property, and the court held that this payment was not an expense of sale and that it did not increase the taxpayer's basis or reduce his gain on the sale.

The petitioners here maintain that the *Yost* case is in conflict with the decision of the Third Circuit in *Frank* v. *Commissioner*, 51 F. 2d 923. (Pet. 12.) The *Frank* case involved a tax year prior to 1942 when alimony payments were not deductible by the husband and the only question in that case was whether the parties intended the payment to the estranged wife to be alimony or in exchange for her interest in the property. After the Board of Tax Appeals had decided that the payment was in lieu of alimony, the Third Circuit reversed on the ground that a fair interpretation of the agreement between the taxpayer and his estranged wife showed that the payment was for her interest in the land in question. There was no evidence in this case that such was the fair interpretation of the agreement here.

Moreover, the taxpayers have utterly failed to prove what portion, if any, of the $52,000 payment was paid with respect to the asserted release of the inchoate dower or homestead rights in the property sold. As the court of appeals noted, the evidence clearly shows that the $52,000 payment was a lump sum general set-

tlement of a marital dispute (Pet. 17) which covered a number of different factors and items. (R. 21.) Clearly, the record contains no breakdown with respect to what portion of the $52,000 may be attributed to the particular real estate sold in the taxable year. For example, the taxpayer husband owned several tracts of land for which his former wife had given him quit-claim deeds (R. 36-37, 38-39, 44, 45-46), only some of which were sold in January, 1948 (R. 40-41, 42). The evidence of record, however, fails to show what portion of the $52,000 should have been allocated to the tracts that were sold or to those that were retained. Clearly, any portion of the $52,000 which was paid with respect to the tracts that were retained could not under any circumstance have been treated as part of the cost of the land sold in January, 1948.

CONCLUSION

The decision of the court below is correct, there is no conflict, and no question of general importance is presented. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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